Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 99-60757

Filed May 1, 2000

Ricardo Lopez-Elias, Petitioner

versus

Janet Reno, Attorney General, Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This case requires the court once again to construe the criminal alien removal provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). Specifically, we must determine whether a Texas conviction of burglary of a vehicle with the intent to commit theft constitutes a theft offense, a burglary offense, or a crime of violence—any of which alone would be sufficient to deny this court jurisdiction to review a final order of removal by the Immigration and Naturalization Service ("INS") and to authorize removal.

Because burglary of a vehicle with intent to commit

theft is a crime of violence (though neither a burglary nor a theft), the IIRIRA deprives us of jurisdiction over this petition. We therefore grant the motion to dismiss.

I.

In 1985, Ricardo Lopez-Elias was convicted in Texas state court of burglary of a vehicle with the intent to commit theft, in violation of TEX. PENAL CODE ANN. § 30.04(A) (West 1987), and sentenced to four years' imprisonment, suspended. In 1998, the INS served him with a notice to appear, charging him with being subject to removal as an aggravated felon, and in April 1999 an immigration judge ordered his removal. The Board of Immigration Appeals ("BIA") dismissed Lopez-Elias's appeal in October 1999, concluding that he had committed a theft offense, an aggravated felony under IIRIRA. See 8 U.S.C. § 1101(a)(43)(G).

Lopez-Elias filed a petition for direct review in this court on November 3, 1999, pursuant to 8 U.S.C. § 1252, arguing that he had not committed an aggravated felony, and alternatively claiming that the IIRIRA was an unconstitutionally retroactive law in violation of his right to due process. The INS now moves for dismissal of the petition on the ground that under the permanent provisions of IIRIRA, *see* 8 U.S.C. § 1252(a)(2)(C),[1] we lack jurisdiction over removal orders issued against criminal aliens.

II.

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[1] Because the proceedings against Lopez-Elias were commenced after April 1, 1997, the permanent provisions of IIRIRA are in force. *See Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 302-03 (5th Cir. 1999); IIRIRA § 309(c)(1), (4), 110 Stat. 3009-625, -626.

Appendix A

We begin by examining the relevant provisions of federal immigration law as amended by IIRIRA. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" includes "(F) a *crime of violence* (as defined in section 16 of Title 18,[2] but not including a purely political offense) for which the term of imprisonment [is] at least one year" and "(G) *a theft offense* (including receipt of stolen property) *or burglary offense* for which the term of imprisonment [is] at least one year." § 1101(a)(43)(emphasis added). IIRIRA further provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. § 1252(a)(2)(C).

We have jurisdiction to review jurisdictional facts.[3] That Lopez-Elias's four-year sentence was suspended is of no significance, for IIRIRA makes plain that "[a]ny reference to a term of imprisonment or a sentence with

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[2] "The term 'crime of violence' means---

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

18 U.S.C. § 16.

[3] *See Camacho-Marroquin v. INS*, 188 F.3d 649, 651 (5th Cir. 1999) ("The prerequisites for review preclusion under INA § 242(a)(2)(C) are: (i) an alien; (ii) deportable; (iii) for committing a crime covered in INA § 237(a)(2)(A)(iii). This Court has jurisdiction to determine whether these prerequisites for precluding review have been met.").

respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." § 1101(a)(48)(B). Nor does Lopez-Elias dispute that he is in fact an alien. The only jurisdictional question, therefore, is whether he was convicted of an aggravated felony---that is, whether burglary of a vehicle with intent to commit theft constitutes a crime of violence, a theft offense, a burglary offense, or none of the above.

The INS claims that its conclusion that Lopez-Elias committed an "aggravated felony" is worthy of the familiar principles of deference to administrative agencies announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).[10] Even assuming the ambiguity of the statutory terms of IIRIRA, however, the fact that courts defer to the INS's construction of its statutory powers of deportation does not mean that similar deference is warranted with respect to the enforcement of this court's jurisdictional limitations. The former may trigger deference, by the determination of our jurisdiction is exclusively for the court to decide. This distinction is particularly important here, where the petitioner challenges not only the INS's statutory construction of its agency powers, but also the constitutionality of those powers.

Reviewing the matter *de novo*, we nevertheless conclude that we have no jurisdiction under IIRIRA, because Lopez-Elias was convicted of a crime of violence under §

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[10] *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. CT. 1291 (2000); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

1101(a)(43)(F). First, however, we articulate why he was *not* convicted of a theft or burglary offense under § 1101(a)(43)(G).

A.

To determine whether an alien has committed an aggravated felony, courts look to the text of the statute violated, not the underlying factual circumstances.[11] According to the statute under which Lopez-Elias was convicted, "[a] person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft." TEX. PENAL CODE ANN. § 30.04(a) (West 1987).[12]

Lopez-Elias was specifically charged with burglary of a vehicle with intent to commit theft. Notably, however, his conviction did *not* require a finding that he had actually committed theft; mere intent to commit was sufficient.

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[11] *See Camacho-Marroquin*, 188 F.3d at 652; *cf. Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994).

[12] At the time of Lopez-Elias's conviction, Texas law classified the offense as a third-degree felony. *See* TEX. PENAL CODE ANN. § 30.04(c) (West 1987). In 1993, the statute was amended to treat the offense as a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 30.04(d) (West 1999). How Texas characterizes the offense does not control federal immigration law, however, for federal law looks only to the term of imprisonment, and not state law, to ascertain whether the offense is a "felony." *See* § 1101(a)(43)(G); *cf. Moosa v. INS*, 171 F.3d 994, 1006 (5th Cir. 1999) (stating that "[t]he immigaration laws contain no . . . indication that they are to be interpreted in accordance with state law") (*quoting United States v. Campbell*, 167 F.3d 94, 98 (2nd Cir. 1999)).

Lopez-Elias therefore did not commit a "theft offense" for purposes of the IIRIRA.[13]

Nor did he commit a burglary offense. When Congress deploys the term "burglary" without specifying a definition, a generic understanding of the word based on the modern usage of the states, rather than the common law definition, should be used. As the Supreme Court has explained,

> [w]e believe that Congress meant by "burglary" the generic sense in which the term is now used in the criminal codes of most States. . . . Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Taylor v. United States, 495 U.S. 575, 598 (1990).

Thus, an alien need not have broken into a dwelling, or done so at night, or done so with intent to commit a felony (as opposed to a lesser offense), to satisfy the generic definition of "burglary." *Id.* at 593. Nor must the act have presented a risk of physical injury to another person. *Id.* at 596-98.

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[13] In addition to listing certain offenses such as theft as "aggravated felonies" triggering deportation, IIRIRA provides that merely "an attempt or conspiracy to commit" an enumerated offense is deemed a deportable offense. § 1101(a)(43)(U). The INS does not raise the argument, but we believe Elias could have been removed – and our jurisdiction could have been precluded – bases alternatively on the theory that burglary of a vehicle with *intent to commit theft* is tantamount to an offense of *attempted theft.*

The Court did distinguish, however, between burglary of "a building or other structure" on the one hand, *id.* at 598-99, and burglary of a vehicle on the other, *id.* at 599, ultimately concluding that the generic term of "burglary" embraced only the former, and not the latter.[14] Because Lopez-Elias was convicted of burglary of a vehicle, not a building, he did not commit a "burglary" for purposes of IIRIRA, and the INS therefore was not authorized to remove him by reason of his commission of a burglary offense.

B.

This court has previously recognized, however, that burglary of a vehicle does constitute a "crime of violence," justifying deportation under § 1101(a)(43)(F).[15] It is true that the INS did not actually pursue removal proceedings on this ground.[16] That the INS proceeded on grounds of theft or burglary, rather than crime of violence, however, does

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[14] *See Taylor,* 495 U.S. at 602 ("For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction.").

[15] *See United States v. Delgado-Enriquez,* 188 F.3d 592, 595 (5th Cir. 1999) (noting that burglary of a vehicle is a crime of violence under 18 U.S.C. § 16(b)); *United States v. Ramos-Garcia,* 95 F.3d 369, 371 (5th Cir. 1996 (same); *United States v. Rodriguez-Guzman,* 56 F.3d 18, 20 (5th Cir. 1995) (same).

[16] Lopez-Elias's original notice to appear charged him with the prior commission of a crime of violence, but the INS subsequently amended its charge to theft or burglary. For this reason, the BIA expressly rejected the use of the crime-of-violence provision to justify removal.

not alter the conclusion that this court has no jurisdiction because of Lopez-Elias's conviction of a crime violence.

IIRIRA states simply that "no court shall have jurisdiction to review any final order of removal against an alien who *is removable* by reason of having committed" an aggravated felony. 18 U.S.C. § 1252(a)(2)(C) (emphasis added). What the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason.[17]

III.

Federal Courts deprive their power to adjudicate from Congress, and not from the Constitution alone. The

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[17] *See Abdel-Razek v. INS*, 114 F.3d 831, 832 (9th Cir. 1997) ("The fact that the BIA did not issue its order with reference to that section does not alter petitioner's status as a convicted felon for purposes of the availability of judicial review. We therefore lack jurisdiction."). We note, however, that other circuits have held differently. *See Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997) ("The INS's argument is essentially a linguistic one. According to the INS, for purposes of jurisdiction, aliens 'deportable by reason of' having committed firearms offenses are not only those aliens who have been ordered deported for firearms offenses, but also those aliens who could be deported for that reason. As a matter of statutory construction, that argument is somewhat illogical: The contested phrase comes from Section 440 (a) of AEDPA, a statutory section solely concerned with final orders of deportation. The section therefore applies, by its very terms, only to aliens who have actually been adjudged deportable. It is therefore highly doubtful that, in that context, Congress meant 'deportable by reason of' to mean, as the INS would have it, 'potentially susceptible to being deported by reason of....'"); *Xiong v. INS*, 173 F.3d 601, 608 (7th Cir. 1999) (same).

permanent provisions of IIRIRA therefore require that this petition for review be dismissed for want of jurisdiction.[18]

Accordingly, the motion to dismiss the petition for review is GRANTED.[19]

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[18] Even if we are required to address Lopez-Elias's constitutional claim on the merits notwithstanding IIRIRA's express preclusion of jurisdiction, *see Max-George*, 205 F.3d 194, 199-200 (5th Cir. 2000) (stating that "courts faced with petitions for review from criminal aliens must determine whether the particular provisions classifying the petitioner under the jurisdiction-stripping provision . . . are being constitutionally applied"), the claim that IIRIRA is unconstitutionally retroactive has been rejected by this court on numerous occasions. *See id.* at 200 ("Congress has the power to make an alien's past criminal conduct subject to present or future deportation notwithstanding the fact that the alien could not have been deported for the act at the time it was committed."); *Moosa*, 171 F.3d at 1009 (opining that "it is well settled that Congress has the authority to make past criminal activity a new ground for deportation.") (*quoting Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992)); see also *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (1957).

[19] The INS's motion for leave to file in excess pages the motion to dismiss the petition for review and to extend the time for riling the administrative record is GRANTED. The INS's motion to extend the time for filing the administrative record is DENIED as unnecessary.

Appendix B

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A13 657 249 - Dallas

Date Filed: October 4, 1999

In re: RICARDO LOPEZ-ELIAS

IN REMOVAL PROCEEDINGS APPEAL

On Behalf of Respondent: Terry-Lynn Winston, Esquire
919 Roble Lane
Santa Barbara, California
93103

On Behalf of Service: James R. Vincent
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

The respondent appeals from a decision of an Immigration Judge finding him removable as an alien convicted of an aggravated felony[1] and ordering the

[1] Recent changes in the definition of an aggravated felony apply to all convictions "regardless of whether they were entered before, on , or after the date of enactment." Section 321(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA). Further, this definition applies to "all actions taken on or after the enactment of (IIRIRA),

respondent removed from the United States to Mexico. The respondent's request for oral argument is denied. 8 C.F.R. § 3.1(e). We will dismiss the appeal.

Before the Immigration Judge and on appeal, the respondent argues that at the time of his conviction his crime was not an aggravated felony. In his appeal brief, first the respondent argues that his 1985 conviction for burglary of a vehicle with the intent to commit theft is not a "burglary" offense because a vehicle does not entail unlawfully entering a building or structure, a required element of the crime of burglary. *See Taylor v. United States,* 495 U.S. 575 (1990) (looking to generic federal definition under 18 U.S.C. § 924(e) for burglary offense); *see also* section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G). The respondent urges that the Immigration Judge erred when he based his decision on his determination that the respondent's conviction for the offense of burglary of a vehicle was a crime of violence instead of whether burglary of a vehicle was a burglary for deportation purposes. Alternatively, he argues that his burglary of a vehicle conviction is not a crime of violence within the meaning of 18 U.S.C. § 16(b), and thus not an aggravated felony under section 101(a)(43)(F) of the Act. He also expressed his disagreement with the Immigration Judge's conclusion that, "The respondent's offense could be viewed as a theft matter as easily as a burglary and either may be considered to involve violent conduct." *See I.J.* at 2. Finally, the respondent argues that the retroactive application of the definition of aggravated felony under section 101(a)(43) of

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regardless of when the conviction occurred." Section 321(c) of IIRIRA.

the Act violates the due process clause of the 5th Amendment of the United States Constitution.

The procedural history of this case is relevant to our consideration of the issues raised on appeal. The Immigration Judge provided an accurate description of the relevant procedural history on the first paragraph of his April 19, 1999, decision. The paragraph stated the following:

> [The respondent] was born in Mexico on September 2, 1949, and was admitted to the United States on February 3, 1964, as an immigrant. On July 11, 1985[,] he was convicted in Dallas County, Texas for a May 26, 1985[,] burglary of a motor vehicle for which he was sentenced to four years in prison which was suspended. On October 20, 1989, an order was entered by the sentencing judge setting aside the judgment of conviction and indictment. Then in late 1998 the respondent was arrested for outstanding traffic tickets apparently and briefly detained. When he was released, the Immigration and Naturalization Service took him into custody and issued a Notice to Appear on December 17, 1998, asserting that he is n aggravated felon and should be deported for the 1985 burglary of a vehicle. As originally filed, the NTA specified that the respondent was viewed as an aggravated felon as defined in the INA 101(a)(43) without reference to any particular subparagraph, but with a reference to a crime of violence. [The] [r]espondent's counsel requested that the reference to aggravated

> felony be clarified, and the INS responded by amending the NTA to explicitly mention INA Section 101(a)(43)(G). Subsection G of the definition contains a specific reference to theft or burglary, whereas subsection F refers to crimes of violence.

I.J. at 1-2.

We first address the question of whether the Immigration Judge erred by finding that the respondent was removable as an aggravated felon for being convicted of a crime of violence pursuant to subparagraph F of section 101(a)(43) of the Act. As noted above, the record shows that instead of answering the respondent's request for clarification of the original charge by stating either that the original charge was clear or that the Service intended to designate subparagraph F, the Service amended its charge by specifying that the respondent was removable under a subparagraph G of section 101(a)(43) of the Act. *See* Exh. 2, Correction of Original Charge. Consequently, the Immigration Judge's discussion relating to the respondent's deportability as an alien convicted of a crime of violence under section 101(a)(43)(F) of the Act is not properly before us because the Service amended the original charge of deportability (Exh. 2).

Section 101(a)(43)(G) of the Act provides, in pertinent part, that "the term aggravated felony means – a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." *Id.* The respondent argues that the United States Supreme Court, in *Taylor v. United, supra,* held that where no definition of burglary is given within the federal statute, a generic definition is to apply which would include the basic

elements of "unlawful or unprivileged entry into, or remaining in a building or structure with intent to commit a crime." *Id.* at 598. The United States Court of Appeals for the Fifth Circuit, noted that, "In making this declaration, the Court in *Taylor* clarified that its definition of burglary for purposes of § 924(e) [title 18 of the United States Code] was generic and premised on the most basic elements of the crime." *United States v. Silva,* 957 F.2d 157, 161 (5th Cir. 1992).

An alien, however, is removable pursuant to section 101(a)(43)(G) of that Act if he commits a theft offense or a burglary offense and is sentenced to a term of imprisonment of at least one year. The conviction for burglary of a vehicle under the Texas statute at issue here requires a showing that the defendant, without the consent of the owner, entered a vehicle with intent to commit any felony or theft. The Service submitted criminal records that show that the respondent was charged and convicted of breaking and entering a motor vehicle of another with the intent to commit a theft. The record contains the True Bill of Indictment that provides that the respondent testified that the respondent, "did unlawfully, knowingly and intentionally break and enter a vehicle, without the effective consent of . . ., the owner thereof, . . . , with the intent to commit theft" (Exh. 3). The respondent testified that he "stole a battery and a radio" (Tr. at 7). The record shows that the respondent's ultimate conviction contained the element of intent to commit a theft. Regardless of the definition of the term "burglary" enunciated in *Taylor v. United States, supra,* we find that the respondent's conviction for burglary of vehicle with intent to commit theft in violation of Tex. Penal Code Ann. § 30.04 is an aggravated felony "theft offense" within the definition of section 101(a)(43)(G) of the Act. We note that the term "theft offense" is broader

than the term "theft"; that is, it incorporates violations other than those which are formally labeled theft. This is made clear by the parenthetical in section 101(a)(43)(G). The respondent received a 4-year suspended sentence to confinement for this offense. Accordingly, we find that the record establishes that he is removable as charged.

The respondent argues that the retroactive application of the changes to immigration law violates his constitutional right to due process of law. We are without authority to declare our governing statute unconstitutional, so we cannot consider the argument that the revised Act violates the respondent's due process rights. *Matter of L-S-J-*, Interim Decision 3322, at 2 (BIA 1997); *Matter of Hernandez-Puente,* 20 I&N Ded. 335, 339 (BIA 1991); *Matter of U-M-,* 20 I&N Dec. 327, 334 (BIA 1991), *aff'd,* 989 F.2d 1085 (9th Cir. 1993); *Matter of Patel,* 19 I&N Dec. 774, 784 (BIA 1988).

The respondent is a native and citizen of Mexico, he expressed no fear of returning to that country, and the Immigration Judge designated Mexico as the country of removal. We find that the respondent has been convicted of an aggravated felony and that he has failed to show eligibility for any relief from removal. Accordingly, we dismiss the appeal.

ORDER: The appeal is dismissed.

Appendix C

THE IMMIGRATION COURT

United States Department of Justice
Executive Office for Immigration Review
1200 Main Street, Suite 700
Dallas, Texas 75202

In the Matter of: Ricardo Lopez-Elias

In Removal Proceedings: A13 657 249

Filed: April 19, 1999

Charge: INA Section 237(a)(2)(A)(iii) Alien convicted of aggravated felony.

For the Immigration Service: Dallas, Texas

For the Respondent: Ms. Terry Winston, Dallas, Texas

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Mr. Ricardo Lopez-Elias was born in Mexico on September 2, 1949 and he was admitted to the United States on February 3, 1964 as an immigrant. On July 11, 1985 he was convicted in Dallas County, Texas for a May 26, 1985 burglary of a vehicle for which he was sentenced to four years imprisonment, which was suspended. On October 20, 1989 an order was entered by the sentencing judge setting aside the judgment of conviction and indictment. Then, in late 1998, the respondent was arrested for outstanding traffic tickets and briefly detained. The Immigration and Naturalization Service (INS) then took him

into custody and issued a Notice To Appear (NTA) on December 17, 1998 asserting that he is an aggravated felon and should be deported for the 1985 burglary of a vehicle. As originally filed the NTA specified that the respondent was viewed as an aggravated felon as defined in the INA 101(a)(43) without reference to any particular subparagraph thereof, but with a reference to a crime of violence. Respondent's counsel demanded that the reference to the aggravated felony definition be clarified and the INS responded by amending the NTA to explicitly mention INA Sec. 101(a)(43)(G). [Subsection G contains a specific reference to burglary whereas subsection F refers to crimes of violence.]

Counsel for respondent has argued that the burglary of a vehicle cannot be viewed as a crime of violence either (1) as a felony that has as an element the use, or threatened or attempted use of force, or (2) as a felony which by its nature involves a substantial risk that physical force against a person or property may be used in the commission of the offense. The courts of the United States in Texas do not share that view. Burglary of a vehicle has been held to be a crime of violence and an aggravated felony if a sentence of a year or more is imposed. *U.S. v. Ramos-Garcia,* 95 F.3d 369 at 371 (5th Cir. 1996), *cert. den.* 117 S. Ct. 351; *U.S. v. Rodriguez-Guzman,* 56 F.3d 18 at 20 (5th Cir. 1995); and *U.S. v. Galvan-Rodriguez,* No. 97-50901, ___ F.3d ___ (5th Cir. 3-4-99).

Counsel for respondent also argued that the respondent's conviction does not conform to the definition of burglary in 18 U.S.C. 924(e) and therefore it does not fit the corresponding definition in the INA. Sec. 101(a)(43)(G) encompasses both theft and burglary. The respondent's offense could be viewed as a theft matter as

easily as a burglary and either may be considered to involve violent conduct. If the proceedings are terminated concerning this case as one limited by INA 101(a)(43)(G) it could immediately be reinstituted as one controlled by INA 101(a)(43)(F) because of the 5th Circuit opinions concerning crimes of violence.

The evidence of record consists of admissions and documents. The documents are:
#1 The Notice to Appear
#2 The amendment to the NTA, a form I-261
#3 The indictment for the 5/26/85 burglary of a vehicle
#4 The judgment of conviction for the 5/26/85 burglary of a vehicle entered on 7/11/85
#5 The 10/20/89 order setting aside the 7/11/85 judgment of conviction
#6 The INS form I-213 dated 12/17/98

The respondent has admitted that: [1] he is an alien, [2] he was admitted as a permanent resident, and [3] he was the defendant in the criminal proceeding which led to the 7/11/85 judgment in evidence as Exhibit #4. Based on the documents and admissions, I find that the respondent is an aggravated felon on account of the 1985 conviction evidenced by Ex #4. The BIA and the United States 5th Circuit Court of Appeal have held that IIRIRA which became effective on September 30, 1996 changed the law pertaining to convictions entered before November 18, 1998. *In re Robt. Lettman,* I.D. 3370 (BIA 11-5-98). *Moosa v. INS,* ___F.3d___ (5th Cir. 4/2/99), 1999 WL 181836 (5th Cir.). Even though the state has relieved him of the Texas disabilities of conviction, (Ex #5) the immigration consequences persist. *In re Roldan-Santoyo,* I.D. #3377 (BIA 3/3/99); *Moosa v. INS, supra.*

Appendix C

Respondent has contended that the Constitution of the United States prohibits any retroactive application of sections of the INA which would make him subject to removal for conduct which might not have made him deportable when committed in 1985. I hold that I do not have jurisdiction to adjudicate such challenges to the validity of the Act or to the authority of the Congress of the United States. In *Moosa,* it was noted that: "it is well settled that Congress has the authority to make past criminal activity a new ground for deportation."

There do not appear to be any forms of relief available to respondent. There do not appear to be any applications for a visa for him pending before the INS. If a visa was available, he could not adjust because a 212(h) waiver is no longer allowed. *In re Ayala-Arevalo,* I.D. #3371 (BIA 1998). No waiver is available under the former INA Sec. 212(c). *In re Ponce de Leon-Ruiz,* I.D. #3261 (BIA 1997) and *In re Cazares-Alvarez,* I.D. #3262 (BIA 1997). Both INA Sec. 240A and 240B preclude grants of cancellation or voluntary departure to aggravated felons. There is no other discernible relief available.

THEREFORE, IT IS ORDERED THAT RESPONDENT, RICARDO LOPEZ-ELIAS BE REMOVED FROM THE UNITED STATES AND RETURNED TO MEXICO.